

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Annual Assessment of the Status of)	MB Docket No. 04-227
Competition in the Market for the)	
Delivery of Video Programming)	

COMMENTS OF RCN CORPORATION

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July 23, 2004

SUMMARY

RCN Corporation (“RCN”), the nation’s first and largest broadband overbuilder supplying voice, data, and video signals to residential subscribers over its own state-of-the-art fiber optic and coaxial network, is pleased to provide these comments for the Commission’s eleventh annual assessment of the status of competition in the multi-channel video programming distribution (“MVPD”) market.

Last year, in connection with the Commission’s retrospective focus in its Tenth Annual Report, RCN referenced back to past filings and presented comments updating the Commission on the significant barriers to market entry that have existed in the MVPD market since the inception of cable competition. These barriers continue to persist today. The regulatory gaps and loopholes that permit the existence of these impediments to competition, which have been well documented in past comments and in the Commission’s previous annual reports, still remain. Predictably, the severity of these hindrances typically increases or diminishes in correlation to the degree of scrutiny focused at any given time on the behavior of the largest multi-system cable operators (“MSOs”), and the then-prevailing view of competition in the market. When MSOs are under review by regulators in the context of mergers or transfers, or the economy is in a slump and the potency of overbuilder competition is seen by the MSOs as thereby having been reduced, RCN experiences less anti-competitive behavior by its rivals. As the economy improves, however, and broadband overbuilders begin to reinforce and expand their toehold in the MVPD market, we have little doubt that these persistent threats to competition will resurge, as well.

As the Commission begins work on its Eleventh Annual Report, RCN is in the midst of a consensual restructuring of the publicly-traded parent company through a chapter 11 bankruptcy proceeding. It is anticipated that RCN will emerge before the end of 2004 with a much

strengthened balance sheet and renewed ability to compete. RCN's operating subsidiaries continue to provide consumers the high quality bundled telecommunications services they demand, at competitive prices, while moving toward long-term profitability. We provide in these comments an update on RCN's status and experience in the market as the nation's premier broadband overbuilder, and reference back to RCN's comments in previous years, wherein RCN has provided the Commission with detailed information regarding specific competitive challenges the Company has faced, and the regulatory strategies that the Commission must undertake to ensure the future viability of MVPD competition.

As in past years, RCN in these comments again urges the Commission to adopt a proactive stance that will address lingering impediments to MVPD competition and encourage the further development and expansion of facilities-based broadband overbuilders such as RCN. The data is now overwhelming – wireline competition is consumers' best hope for improved service quality, greater choice, and lower prices. Meaningful solutions to the market barriers repeatedly identified by commenters, consumer advocates, and the Commission itself for many years now must be achieved, and soon, so that the full potential of wireline MVPD competition, and its benefits to consumers, can be more fully realized. Fostering full, fair, and viable long-term MVPD competition can and should be a part of this Commission's legacy.

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Pursuant to the Notice of Inquiry (“NOI”) released by the Commission in the above-captioned matter on June 17, 2004,¹ RCN Corporation (“RCN”), by the undersigned counsel, hereby submits its Initial Comments in this proceeding.

I. INTRODUCTION: THE CURRENT COMPETITIVE ENVIRONMENT

RCN, through its subsidiaries and affiliates, is the nation’s largest terrestrial cable overbuilder. RCN has constructed its own facilities-based broadband distribution network in the Boston, New York, Philadelphia/Lehigh Valley, Chicago, San Francisco, Los Angeles and Washington, D.C. metropolitan markets.² RCN offers subscribers a bundled package of local and long distance telephone services, high-speed Internet access, and cable and OVS broadband distribution services, including High Definition Television (“HDTV”) and video-on-demand. RCN has been instrumental in introducing competition into the local telephone market,

¹ In the Matter of Annual Assessment of the Status of Competition in the Market for Delivery of Video Programming, *Notice of Inquiry*, MB Dkt. No. 04-227, FCC 04-136, rel. June 17, 2004.

² In 2003, RCN sold its franchised cable operations in central New Jersey, where it operated as the incumbent cable provider. RCN in March of 2004 also completed the sale of its cable system in Carmel, New York.

especially for residential customers, and has been at the forefront of providing an alternative to the incumbent cable operators.

It is undisputed that the telecommunications industry and related sectors have experienced a dramatic downturn in growth and prosperity since 2000. In the last several years, the financial value of the telecommunications market has plummeted.³ In the year 2000, companies raised almost \$100 billion from initial public offerings, breaking the 1999 record.⁴ In addition, a record \$17.6 billion was invested in companies by venture capital funds in the second quarter of 2000, nearly double the total investment in 1998.⁵ A year later in 2001, it was declared that “[t]he venture-capital bubble has burst.”⁶ As a result, it has become extremely difficult for companies in this industry to raise the financing they need to initiate and maintain operations.⁷ This is particularly true for start-up companies in the competitive overbuilder market, such as RCN, where a tremendous amount of capital and up-front funds are needed to construct the networks.⁸ In its 2001 Report to Congress on the status of competition in the MVPD market, the Commission recognized this, noting that “in addition to the difficulties inherent in entering the capital-intensive MVPD industry against entrenched competitors,

³ The Brookings Institution, Policy Brief #112 at 2 (December 2002).

⁴ O’Hara, “It was the Best of Times and the Worst of Times, and the Difference Was All in the Numbers,” WASH. POST, Dec. 31, 2000, at H1.

⁵ *Id.*

⁶ Johnston, “Venture Capitalists Show Caution Like the Old Days,” WASH. POST., May 14, 2001 at E01; Zuckerman, “Looking Back: Experts Learn Tech Rallies, Too, Must End,” WALL ST. J., Mar. 9, 2001, at C1.

⁷ State of the Telecommunications Industry in Virginia, CIT Industry Report, Ernst & Young, June 2002, at 5 (as recognized by the Virginia telecommunications industry executives, “[g]enerating cash quickly and efficiently has become very important. Lack of capital will destroy a lot of good companies and limit innovation.”).

⁸ For example, WinFirst, Inc., a cable overbuilder in San Diego, California was forced to file for bankruptcy after its funding dried up in 2002. *Denver-Based Telecom Firm WinFirst Files for Chapter 11 Bankruptcy*, SAN DIEGO UNION TRIBUNE, Mar. 14, 2002.

[Broadband Service Providers ‘BSPs’] are facing difficulties in obtaining capital. As a result, many BSPs have scaled back plans, reduced capital expenditures, reduced staff, or shut down operations altogether”⁹

When the capital markets closed and the telecom industry contracted, RCN recognized the need to conserve its cash. The company revised its growth plans and curtailed capital spending and construction. RCN pulled out of markets, including Seattle, Portland, and parts of southern California, where it had taken too long to negotiate viable franchise and rights-of-way access agreements with the local municipalities, and necessary network construction had not occurred prior to the market downturn. During the past two years, RCN has been engaged in renegotiating its existing franchises with numerous jurisdictions to eliminate commercially impracticable area-wide build-out obligations, and to bring related financial obligations, such as large bonding requirements and lump-sum support for public, educational, and governmental purposes, into line with RCN’s existing network footprint and actual subscriber and revenue base. RCN focused on making operations more efficient. By focusing on increasing revenues and services per customer, the company’s revenues grew from \$350 million in 2000 to a run rate of \$560 million as of the third quarter of 2003. RCN also addressed cost structure. In 2000, EBITDA loss was over \$500 million with Selling, General and Administrative costs at 150% of Total Revenue. In contrast, for the first 9 months of 2003, RCN had an EBITDA gain of \$8 million and Selling, General and Administrative costs at 64% of Total Revenue – that is almost double the revenue at half the cost in only 36 months. Detailed information regarding RCN’s

⁹ Annual Report on the Status of Competition in the Market for Delivery of Video Programming, *Eighth Annual Report*, 17 FCC Rcd 1244, ¶¶ 108-111 (2002).

customer connections and revenues is available in its 2003 10-K Report, which can be obtained at <http://www.rcn.com/investor/annualreports.php>.

In addition to achieving these operational efficiencies, RCN also needed to improve its balance sheet. In an effort to grow quickly, the company had taken on a lot of debt, which it anticipated supporting with the cash the business would generate from growth in customers. But when growth was slowed by regulatory delays, by anti-competitive behavior on the part of RCN's entrenched incumbent rivals, and by the shut-down of the capital markets, RCN was forced to revise its business plan. Through various financial transactions, the company reduced its debt by over \$1 billion in 2001 and early 2002. With just over \$1.7 billion in debt remaining, RCN has negotiated a consensual balance sheet restructuring that is expected to reduce its remaining debt to approximately \$480 million. In order to facilitate the restructuring, RCN Corporation, the publicly-traded parent holding company, and several non-operating subsidiaries in May of 2004 filed voluntary petitions for reorganization under Chapter 11 of Title 11 of the United States Code in the U.S. Bankruptcy Court for the Southern District Court of New York. RCN expects to emerge from bankruptcy with an approved plan of reorganization by the end of 2004. Additional information regarding the progress of RCN's restructuring is available at <http://www.rentomorrow.com>.

Simultaneously, RCN continues to be at the forefront for consumers, launching more products, thinking differently, and taking on new frontiers. For example, RCN set up the website www.championingyou.com to allow consumers to address their issues with programming costs, which have skyrocketed in recent years. RCN understands the plight of the cable customer, and

is working to stem the tide of rate increases and continue to provide value.¹⁰ RCN also is committed to providing innovative new technologies to customers in its markets. Recent examples include the July 6, 2004, launch of an exciting new fully integrated online music subscription tier within its RCN interACTION lineup. RCN interACTION Music provides subscribers to this premium-tier service with unlimited access to the digital music world's largest library, offering more than 700,000 high-quality tracks from the world's five largest music companies and hundreds of independent labels. RCN on July 20, 2004, announced the launch of its Digital Video Recorder ("DVR") service, beginning with the Boston and New York markets. DVR enables customers to record programming content to a hard drive within the digital set-top box, which can store up to 50 hours of standard definition content for playback at the customer's leisure. With DVR, the customer can record, playback, pause, and rewind programming. Using the interactive programming guide provided by RCN, a customer can record an entire season of their favorite show. In total, RCN has rolled out more than 40 new products in the last 3 years, increased all of its key operational metrics, and continued delivering a new standard of service.

To continue to provide this level of consumer choice, service, and value, it is imperative that RCN have nondiscriminatory access to "must have" programming content, technologically innovative products, and other essential inputs, and compete in a marketplace in which price competition is fair, uniform, and based on market realities, rather than predation against competitors. As technology continues to evolve and the industry moves toward all-digital service delivery platforms, it will be necessary for the Commission to promulgate new

¹⁰ See, e.g., Letter from RCN Corporation to W. Kenneth Ferree, Chief, FCC Media Bureau, dated June 11, 2004, in MB Docket 04-227. RCN also supports the Voluntary A La Carte initiative recently put

regulations and/or seek new legislation to ensure nondiscriminatory access to digital content for all providers, across all delivery platforms, so that consumers can access the content they want, through the provider they choose, over the platform they prefer. RCN, a member of the Broadband Service Providers Association (“BSPA”), endorses both the views and the policy recommendations set forth in the Comments of the BSPA filed in this proceeding, and urges the Commission to adopt the regulatory and legislative positions advocated by the BSPA to ensure that competition by BSPs such as RCN may continue to flourish.

II. WIRELINE COMPETITION IS ESSENTIAL TO CONSUMERS

Without a doubt, RCN’s presence in the marketplace is a benefit to consumers, resulting in lower prices, improved customer service, and the innovation and introduction of new services. The Commission has acknowledged the benefits of the competition that broadband service providers, such as RCN, can provide: “[C]ompetition often results in lower prices, additional channels, improved services, or additional non-video services.”¹¹ Indeed, RCN is precisely the type of competitor Congress envisioned when it opened the broadband market to competition through passage of the Telecommunications Act of 1996.

The Commission recognizes that competition works, despite the impediments faced by competitors, and has so acknowledged in prior annual reports on the status of competition in the MVPD market.¹² As stated by the Commission, “Generally, we find that in communities where

forward by the Broadband Service Providers Association.

¹¹ Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming, *Seventh Annual Report*, 16 FCC Rcd 6005, ¶ 39 (2001).

¹² See, e.g., Annual Assessment of the Status of Competition in Markets for the Delivery of

head-to-head competition is present, the incumbent cable operator has responded to competitive entry in a variety of ways, such as lowering prices, providing additional channels at the same monthly rate, improving customer service, adding new services including high speed Internet and telephone services, or by challenging the legality of the entrant's activities."¹³ These observations are borne out by RCN's experience in a variety of markets, and by independent consumer advocacy groups. For example, the comprehensive report by the U.S. Public Interest Research Group released in August 2003 ("USPIRG Report") states that:

Cable price increases have been restrained by competition only when a wireline competitor, often referred to as an overbuilder, enters a market to challenge the incumbent. Where such overbuilder competition exists, the effect is dramatic: One GAO report concluded that cable rates are 17% lower where there is an overbuilder in a franchise area.¹⁴

In a subsequent report focused specifically on the competition provided by BSPs, such as RCN, in six comparative markets, the Government Accounting Office ("GAO") in fact found that:

The rates for telecommunications services were generally lower in the 6 markets with BSPs than in the 6 markets without a BSP. For example, expanded basic cable television rates were 15 to 41 percent lower in 5 of the 6 markets with a BSP when compared to their matched [demographically comparable] market [without a BSP].¹⁵

Video Programming, *Fourth Annual Report*, 13 FCC Rcd 1034 (1998), ¶¶ 131-132; *Fifth Annual Report*, 13 FCC Rcd 24284, ¶¶ 121 and 136-137; *Sixth Annual Report*, 15 FCC Rcd 978, ¶¶ 129-133; *Seventh Annual Report*, *supra* n.11, ¶¶ 213-238.

¹³ *Seventh Annual Report*, *supra* n.11, ¶ 213.

¹⁴ The Failure of Cable Deregulation: A Blueprint for Creating a Competitive, Pro-Consumer Cable Television Marketplace, U.S. Public Interest Research Group, August 2003, at 1 ("USPIRG Report").

¹⁵ U.S. Government Accounting Office, Report to the Subcommittee on Antitrust, Competition Policy and Consumer Rights, U.S. Senate, *Wire-Based Competition Benefited Consumers in Selected Markets*, February 2004, Highlights, at 1.

The GAO concluded:

On the basis of the 12 markets we examined, it appears that BSPs' entry into a market benefited consumers in the form of lower prices for subscription television, high-speed Internet access, and local telephone services. Incumbent cable operators often responded to BSP entry by lowering prices, enhancing the services that they provide, and improving customer service. ...The combined effect of BSP entry and incumbent companies' response provides significant benefits for consumers.¹⁶

The Commission's own findings also support the conclusion that the presence of an overbuilder in the market is one of the few factors that acts as a check on cable rate increases:

As of [July 1, 2002], cable operators facing competition were charging, on average, \$37.84 while operators not facing competition were charging \$40.26. The difference in average monthly rates between the competitive and noncompetitive groups (the "competitive differential") was 6.4% for 2002, close to the 5-year average differential of 6.5%. On a per channel basis, competitive and noncompetitive cable operators, respectively, charged 63.7 cents and 66.6 cents per channel as of July 1, 2002, a differential in average monthly rate per channel of 4.6%.¹⁷

Congress, in enacting the Telecommunications Act of 1996, gave the Commission a clear mandate to foster competition in the MVPD market. Moreover, the interests of the public, as consumers of MVPD services, demand that competition be nurtured, so as to produce the benefits to consumers that only competition, as demonstrated by RCN's presence in the market, can bring. It is both necessary and appropriate, therefore, that the Commission act on these mandates and take further pro-active steps to ensure the continued vitality of broadband overbuilders as competitors in the MVPD arena. As RCN has asserted in past comments, the alternative – a return to cable monopolies in a de-regulated MVPD world – is antithetical to the

¹⁶ *Id.*, at 4.

¹⁷ FCC Releases Report on 2002 Cable Industry Prices, FCC News Release, July 8, 2003.

pro-competitive intent of the Telecommunications Act of 1996, and is contrary to the public interest.

III. TO ENABLE WIRELINE COMPETITION, BARRIERS MUST BE REMOVED

In its pleadings filed in previous years, RCN has provided the Commission with detailed information on the barriers to competition that RCN has faced over the years as a new entrant in the MVPD market.¹⁸ While RCN applauds the Commission's efforts to date to address these obstacles to competition, more can and should be done. RCN continues to advocate the proposed regulatory and legislative solutions presented in its prior comments, including the following pro-active steps to be taken by the Commission:

- Strict enforcement of the Commission's program access rules and, where necessary, legislative changes that will ensure competitors non-discriminatory access to critical programming under reasonable rates, terms and conditions;

¹⁸ See e.g., Comments of Residential Communications Network, Inc., dated July 19, 1996, in CS Docket No. 96-133 (for the *Third Annual Report*); Reply Comments of RCN Telecom Services, Inc., dated Aug. 20, 1997 (for the *Fourth Annual Report*); Comments of RCN Telecom Services, Inc., dated July 13, 1998, and Reply Comments of RCN Telecom Services, Inc., dated Aug. 31, 1998, in CS Docket No. 98-102 (for the *Fifth Annual Report*); Comments of RCN Corporation, dated Aug. 6, 1999, and Reply Comments of RCN Corporation, dated Sept. 1, 1999, in CS Docket No. 99-230 (for the *Sixth Annual Report*); Comments of RCN Corporation, dated Sept. 8, 2000, and Reply Comments of RCN Corporation, dated Sept. 28, 2000, in CS Docket No. 00-132 (for the *Seventh Annual Report*); Initial Comments of RCN Telecom Services, Inc., dated Dec. 3, 2001, and Reply Comments of RCN Telecom Services, Inc., dated January 7, 2002, in CS Docket 01-290 (for the *Eighth Annual Report*); see also Initial Comments of RCN Telecom Services, Inc., dated January 4, 2002, in CS Docket 98-82 (Cable Attribution Proceeding); Petition of RCN Telecom Services, Inc. to Deny Applications or Condition Consent, dated April 29, 2002, in MB Docket No. 02-70 (AT&T/Comcast Merger); Comments of RCN Telecom Services, Inc., dated June 16, 2003, in MB Docket No. 03-124 (Hughes/News Corp. Merger).

- Insofar as the Commission believes it cannot close the terrestrial loophole, due to statutory language referencing only satellite-delivered programming, inform Congress of the urgent need for legislation to permit expansion of the program access rules to close this anti-competitive gap in the law.
- As technology evolves, promulgate new regulations and/or seek new legislation to prevent discrimination in access to the digital content that will be delivered by next-generation services, such as video-on-demand.¹⁹
- The Commission should also give serious consideration to the need for legislation to extend the existing program access rules to prohibit exclusive agreements for unaffiliated programming, in view of the enormous and growing market power of the largest MSOs.²⁰
- Promulgate regulations and/or seek legislation to prevent incumbent cable operators from engaging in discriminatory and predatory pricing and other acts of anti-competitive behavior aimed at driving competitors out of the market.
- Enforce the Commission's rules to ensure that competitors have reasonable and non-discriminatory access to essential poles, ducts, and conduit, as well as wiring in MDUs.

¹⁹ The FCC has recognized the growing importance of these emerging technologies. *See*, Assessment of the Status of Competition in Markets for the Delivery of Video Programming, *Eighth Annual Report*, 17 FCC Rcd. 1244, ¶187 (2002).

²⁰ The FCC specifically found, in analyzing the AT&T-Comcast merger, that "The record demonstrates that AT&T and Comcast individually already have sufficient presence in their respective franchise areas to secure exclusive contracts for unaffiliated national, local and regional programming."

IV. CONCLUSION

Although broadband overbuilders, including RCN, have struggled in the difficult economic climate of the past several years, competition is alive and well, and will flourish in a legal and regulatory environment that creates enables full, fair, and nondiscriminatory access to the marketplace. Indisputably, consumers in markets where there is a BSP such as RCN present are reaping the benefits of competition, just as Congress intended. Nonetheless, many more consumers could and should receive the benefits of competition. To fully realize the promise of MVPD competition, the Commission must act swiftly and decisively to respond to the impediments to competition identified by RCN, the BSPA, consumer groups, and others. RCN urges the Commission to be vigilant and pro-active in developing policies aimed at eliminating the anti-competitive behavior and barriers to competition now well-documented in the Commission's Annual Reports.

Respectfully submitted,

By:

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July 23, 2004

APPENDIX A

RCN SERVICE CONNECTIONS²¹

As of December 31, 2003

Telephone	275,183
Video	411,164
High-Speed Internet	197,543
Subtotal, Network Connections	883,890
Total On-Network Customers	436,668
Resale Telephone	10,178
Dial-Up Internet	184,434
Total Service Connections	1,078,502

Source: <http://www.rcn.com/investor/annualreports.php>

²¹ Includes figures for Starpower Communications, LLC; excludes discontinued operations.

CERTIFICATE OF SERVICE

I, L. Elise Dieterich, hereby certify that on this 23rd day of July, 2004, the foregoing Comments of RCN Corporation were filed electronically via the Internet to <http://www.fcc.gov/cgb/ecfs/>, and a copy served via e-mail on the following:

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